ORIGINAL

NO. 2011-0215

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94737

IN RE: M.W.,
Adjudicated delinquent child

MEMORANDUM IN OPPOSITION TO JURISDICTION

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The decision of the Eighth District Court of Appeals applied clearly established precedent from this Honorable Court. Courts have recognized that a juvenile's constitutional rights are not violated where the juvenile waives his or her Miranda rights without first consulting with a parent or attorney. Juveniles such as M.W. have a right to counsel during all stages of the proceedings under Revised Code Chapter 2151 or Revised Code Chapter 2152 – whether a "stage of the proceedings" includes interrogations is a matter of statutory interpretation. The question of whether a juvenile court judge must consider the form used, to waive Miranda and the juvenile's literacy level to ensure that the child has an intelligent understanding of the document and an appreciation of the gravity of signing it, has an answer. These are not issues that raise a substantial constitutional question or issue of great public or general interest.

M.W.'s first proposition of law raises the issue of what is a stage of the proceeding under Revised Code Chapter 2151 and 2152. Juveniles are guaranteed a statutory right to counsel at all stages of the proceedings. In enacting R.C. 2151.352, the General Assembly intended to ensure that juveniles are represented during delinquency proceedings.

M.W.'s appeal presents an issue that relies upon an expansive interpretation of R.C. 2152.352 that goes beyond what the statute requires. Without support for his interpretation of R.C. 2152.352, any error in the trial court cannot be plain error nor could trial counsel be ineffective for failing to raise it. Further, M.W.'s second proposition of law does not raise a substantial constitutional question or issue of great public interest. The Eighth District considered the totality of the circumstances and found that under the totality of the circumstances that M.W. gave a valid waiver of his Miranda rights.

Even if this Honorable Court were inclined to agree that R.C. 2152.352 requires a juveniles to have counsel or a parent present during a interrogation (that occurs prior to any delinquency proceeding), M.W. is not entitled to relief since, the Eighth District held that M.W.'s trial counsel was not ineffective for not raising these claims. M.W.'s trial counsel cannot be said to have been ineffective for failing to raise a claim that has no legal support. Nor can plain error exist in this case. The true question is whether trial counsel was ineffective for failing to raise the propositions of law raised in this appeal.

Accordingly, M.W.'s appeal does not present a substantial constitutional question and does not present any issue of great public or general interest.

STATEMENT OF THE CASE AND FACTS

The Eighth District Court of Appeals found the facts of this case as follows:

> On August 22, 2009, a complaint was filed against M.W ., alleging that he was delinquent for aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree if committed by an adult, with a gun specification. The complaint further alleged that M.W. was 15 years old at the time of the offense. He pleaded not guilty to the charge. The state sought to transfer the case to the general division and have M.W. tried as an adult. Although the court found probable cause to do so, it ultimately decided that M.W. was amenable to the juvenile justice system and retained jurisdiction. The matter proceeded to an adjudicatory hearing before a magistrate.
>
> The allegations giving rise to the complaint were that in the late evening of August 19, 2009, M.W., along with another juvenile, robbed the victim at gunpoint in the vicinity of Tremont and Jefferson avenues in Cleveland. Among other things, the state offered into evidence a written statement signed by M.W. wherein he confessed to his involvement in the robbery. Specifically, he stated the following: "I watched [the co-delinquent]' s back, I kept anyone from walking up on him or watched for the police." He further stated that the co-delinquent carried the firearm. He also acknowledged that the money was supposed to be split between the two of them, but that the co-delinquent was caught before they had a chance to divide the money.
>
> The magistrate ultimately found that the state proved the allegations of the complaint beyond a reasonable doubt, thereby finding M.W. delinquent of the charge of aggravated robbery and the three-year firearm specification. The

> trial judge subsequently adopted and affirmed the magistrate's decision and placed M.W. in the custody of the ODYS for an indefinite term consisting of a minimum period of 12 months and a maximum period not to exceed his attainment of 21 years of age.

In re M.W., Cuyahoga App. No. 94737, 2010-Ohio-6362, ¶2-4.

On direct appeal, M.W. raised three assignments of error:

> [I.] The trial court violated M.W.'s right to due process when it admitted into evidence the typed statement of M.W.'s custodial statements to the police, which were obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution and R.C. 2151.352.
>
> [II.] The trial court committed plain error and violated M.W.'s right to due process when it admitted into evidence the typed statement of M.W.'s custodial statements to the police, because those statements were elicited in violation of M.W.'s constitutional right against self-incrimination.
>
> [III.] M.W. was denied effective assistance of counsel as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

In re M.W., Cuyahoga App. No. 94737, 2010-Ohio-6362, ¶6-9.

The Eighth District affirmed M.W.'s delinquency adjudication and M.W. filed an appeal before this Honorable Court which raises two propositions of law, challenging the validity of his *Miranda* waiver.

LAW AND ARGUMENT

RESPONSE TO PROPOSITION OF LAW I: A CHILD HAS THE RIGHT TO COUNSEL AT ALL STAGES OF THE PROCEEDINGS AGAINST HIM. BECAUSE OHIO'S GENERAL ASSEMBLY HAS DESIGNATED INTERROGATION AS A STAGE OF THE PROCEEDING, A CHILD MUST BE REPRESENTED BY HIS PARENT, GUARDIAN, CUSTODIAN, OR AN ATTORNEY BEFORE THE CHILD CAN WAIVE HIS RIGHT TO COUNSEL PURSUANT TO MIRANDA.

The first proposition of law does not raise a constitutional question but instead involves a question of statutory interpretation – what does "stage of the proceeding" mean?

The question is not one of great public or general interest because the statute does not apply to interrogations that occur before delinquency proceedings have commenced.

Ohio law grants a statutory right for a juvenile to have counsel or a parent present during stages of the proceeding. This Court has recognized, as well as other high courts in other states, that a juvenile could waive his or her Miranda rights without presence of a parent. See *In re Watson* (1989), 47 Ohio St.3d 86, 548 N.E.2d 210.

This Court in *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 847 N.E.2d 1177 held that:

> 1. The word "represent" in the fifth sentence of R.C. 2151.352 means to counsel or advise the juvenile in a delinquency proceeding.
>
> 2. In a delinquency proceeding, a juvenile may waive his constitutional right to counsel, subject to certain standards, if he is counseled and advised by his parent, custodian, or guardian. If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel.
>
> 3. A totality-of-the-circumstances analysis is the proper test to be used in ascertaining whether there has been a valid waiver of counsel by a juvenile.

In re C.S., does not stand for the proposition that a juvenile is entitled the right to counsel prior to the initiation of delinquency proceedings.

The first sentence of R.C. 2151.352 states: A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. The General Assembly limited a "stage of proceedings" to those under Revised Cod Chapter 2151 or Revised Code Chapter 2152. Revised Code 2151 relates to the Juvenile Court and Revised Code 2152 relates to Delinquency Proceedings. These proceedings do not include actions

taken outside of the Juvenile Court's jurisdiction or actions taken prior to the filing of a juvenile complaint.

The Eighth District in addressing M.W.'s arguments held:

> M.W. argues that his statement was taken in violation of his right to counsel under R.C. 2151.352, which provides juveniles with the right to counsel that goes beyond constitutional requirements. See *In re C.S.,* 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 83. Specifically, R.C. 2151.352 provides that "[a] child * * * is entitled to representation by legal counsel at all stages of the proceedings under this chapter of Chapter 2152 of the Revised Code." FN1 Relying on *In re C.S.,* M.W. contends that this right to counsel under R.C. 2151.352 is absolute, even for purposes of an interrogation, and that it cannot be waived when neither his parent nor attorney has counseled him regarding a waiver of this right. We find M.W.'s argument unpersuasive.
>
> First, as recently recognized by the Third District, R.C. 2151.352 does not consider an "investigatory interrogation" as a "stage" of the proceeding under the statute. *In re Forbess,* 3d Dist. No. 2-09-20, 2010-Ohio-2826, ¶ 33. Indeed, a juvenile proceeding does not commence until the filing of a complaint. Id. Thus, because no complaint had been filed against M.W. at the time of the police interrogation, R.C. 2151.352 does not apply. And while M.W. did have a Fifth Amendment right to counsel under Miranda, he never exercised that right.
>
> Second, we find M.W.'s application of *In re C.S.* misplaced. In that case, the Ohio Supreme Court held that "in a delinquency proceeding, a juvenile may waive his constitutional right to counsel, subject to certain standards articulated below, if he is counseled and advised by his parent, custodian, or guardian. If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel." *In re C.S.* at ¶ 98. The Court's holding, therefore, is limited to a "delinquency proceeding"; it has no bearing on a juvenile's waiver of Miranda rights during a police interrogation prior to the commencement of a delinquency proceeding.

In re M.W., Cuyahoga App. No. 94737, 2010-Ohio-6362, ¶15-17.

Simply put, a police interrogation is not a stage of the proceeding under Revised Code Chapter 2151 or 2152. M.W. does not have a statutory right to the presence of counsel or a parent during a police interrogation that occurs before the initiation of delinquency proceedings. The Eighth District relied upon the Third District Court of

Appeals decision in *In re Forbess*, Third Dist No. 2-09-20, 2010-Ohio-2826 wherein the same issue was raised. The Third District in addressing the issue held:

> Additionally, R.C. 2151.352 provides juveniles with the right to counsel that goes beyond constitutional requirements. *In re C.S.*, 115 Ohio St.3d 267, 874 N.E.2d 1177, 2007-Ohio-4919, ¶ 83. See, also, Juv.R. 4(A). The statutory section provides this right "at all stages of the proceedings under this chapter or Chapter 2152 of the Revised Code." R.C. 2151.352. Chapter 2152 of the Ohio Revised Code specifically deals with juvenile offenses, with the commencement of juvenile delinquency proceedings beginning with the filing of a complaint. *Wright v. State* (1990), 69 Ohio App.3d 775, 781, 591 N.E.2d 1279. See, also, Juv.R. 29(G) (defining "court proceeding" as "all action taken by a court from the earlier of (1) the time a complaint is filed and (2) the time a person first appears before an officer of a juvenile court until the court relinquishes jurisdiction over such child").
>
> [***]
>
> Additionally, we find there to be no violation of Forbess' right to counsel pursuant to R.C. 2151.352. Although Forbess argues that interrogation is considered a "stage" of the proceeding under this statutory section, wherein his right to counsel attaches, he misreads the statute. A juvenile criminal proceeding does not commence until the filing of a complaint, and, at the time of the interview, no complaint had been filed. Although Forbess did have a Fifth Amendment right to counsel under Miranda, he never exercised that right at any point during the interview by requesting an attorney. Furthermore, Forbess cites to no authority for his proposition that his right to counsel under R.C. 2151.352 applies during an investigatory interrogation.

In re Forbess, Third Dist No. 2-09-20, 2010-Ohio-2826, ¶29, 33.

R.C. 2151.352 does not include an interrogation, such as M.W.'s, as a stage of the proceeding. It only applies to proceedings under Revised Code Chapter 2151 and 2152. While the second paragraph of R.C. 2151.352 guarantees that juveniles who are taken into custody, the rights that adults have under R.C. 2935.14 (rights of person arrested), nothing in R.C. 2935.14 gives an adult the right to have an attorney present before waiving their *Miranda* rights. The second paragraph entitles parents and an attorney presence at <u>any hearing</u> involving the child <u>after reasonable notice</u> of the hearing is given. This is indicative

that "all stages of the proceedings" as used in R.C. 2151.352 is meant to apply only to hearings after delinquency proceedings have commenced.

This issue raised in this proposition of law was raised in the Eighth District under an ineffective assistance of counsel claim. M.W.'s trial counsel cannot be said to have been ineffective where, there is no clear pronouncement supporting M.W.'s proposition of law . This Court has recognized that a lack of a definitive pronouncement from this Honorable Court and disagreement among the lower courts precludes a finding of plain error. See *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68. "When claiming ineffective due to failure to file or pursue a motion to suppress, an appellant must point to evidence in the record showing there was a reasonable probability the result of trial would have differed if the motion had been filed or pursued. If case law indicates the motion would not have been granted, then counsel cannot be considered ineffective for failing to prosecute it." *State v. Walker*, Eleventh Dist. No. 2009-L-155, 2010-Ohio-4695, ¶15 (internal citations omitted).

Although M.W. provides this Honorable Court with an argument in support of his broad definition of "all stages of the proceedings," M.W. has not provided clear precedent that adopts his reading of R.C. 2151.352. This Court recognizes that juveniles can waive their *Miranda* rights during interrogations without the presence of a parent. See *In re Watson* (1989), 47 Ohio St.3d 86, 548 N.E.2d 210 and *In re Howard* (1997), 119 Ohio App.3d 33, 694 N.E.2d 488.

Thus, M.W.'s trial counsel cannot be said to have been ineffective for failing to prosecute the argument, M.W. asks this Court to review nor can it be said that plain error occurred in this case.

Accordingly, this Honorable Court should decline to accept M.W.'s first proposition of law for review as it is not a constitutional question. Moreover, an interrogation is not a stage of the proceeding under Revised Code Chapter 2151 and 2152.

RESPONSE TO PROPOSITION OF LAW II: IF A WRITTEN WAIVER OF MIRANDA HAS BEEN EXECUTED, THE JUVENILE COURT JUDGE MUST CONSIDER THE FORM USED AND THE JUVENILE'S LITERACY LEVEL TO ENSURE THAT THE CHILD HAS AN INTELLIGENT UNDERSTANDING OF THE DOCUMENT AND AN APPRECIATION OF THE GRAVITY OF SIGNING IT.

In determining whether a juvenile has validly *waived,* Miranda, does a court have to consider the written waiver form, the juvenile's literacy level, the juvenile's intellect and appreciation of signing the waiver form? This is a question with an answer. See *In re C.S.,* supra. at ¶109.

The Eighth District applied to correct standard in determining the validity of M.W.'s waiver of Miranda rights:

> Juveniles are entitled both to protection against compulsory self-incrimination under the Fifth Amendment and to Miranda warnings where applicable. Any statements made by a suspect may not be used in evidence where those statements were made during a custodial interrogation unless Miranda warnings were properly given to the suspect. A suspect, therefore, may either waive or invoke his Miranda rights, including his Fifth Amendment right to counsel, and, if a request for counsel is made, the interrogation must not recommence until counsel is present.
>
> In determining whether a juvenile has properly waived his Miranda rights, the reviewing court must examine the totality of the circumstances surrounding the waiver, " 'including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'

In re M.W., Cuyahoga App. No. 94737, 2010-Ohio-6362, ¶20-21 (internal citations omitted).

Applying this established standard, the Eighth District found:

> Based on our review of the record, we find that M.W.'s waiver of his right to counsel was voluntarily given. First, M.W. testified at trial that he was told his *Miranda* rights prior to making a statement and that he understood such rights. Aside from M.W.'s own admission, the factors we must consider support our conclusion that the waiver was voluntarily made. Here, the record reveals that M.W. has had prior experiences with the police and that he has been adjudicated delinquent in other cases. M .W., who was 15 at the time of the interrogation, further exhibited the mental and emotional capacity to voluntarily waive his rights. According to the detective, M.W. acted "normal" and was not under the influence of drugs or alcohol at the time of the interrogation. There was no evidence that M.W. had a diminished understanding, and he openly admitted that he could read. Further, the interrogation lasted only 35 minutes. Based on all these circumstances, we do not believe that M.W.'s trial counsel was ineffective for failing to move to suppress his statement based on an involuntary waiver of *Miranda* rights.

In re M.W., Cuyahoga App. No. 94737, 2010-Ohio-6362, ¶22.

To summarize, the Eighth District found:

1) M.W. had prior experiences with the police and had been previously adjudicated delinquent in other cases;

2) M.W. was 15 at the time of the interrogation;

3) M.W. had the mental and emotional capacity to voluntarily waive his rights;

4) M.W. was not under the influence of drugs or alcohol at the time of the interrogation; and

5) M.W. openly admitted that he could read.

M.W.'s second proposition of law does not raise a substantial constitutional question or issue of great public or general interest, because in reviewing the record and applying the proper standard of review, the Eighth District found that under the totality of the circumstances, there was a valid waiver of *Miranda* rights. This proposition of law instead

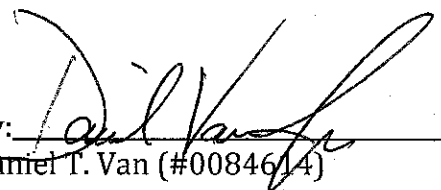
seeks to have the Eighth District's findings reviewed. Accordingly, this Honorable Court should decline to review M.W.'s second proposition of law.

CONCLUSION

For the foregoing reasons, this Honorable Court should dismiss M.W.'s appeal because the memorandum in support of jurisdiction does not raise a substantial constitutional question or issue of great public or general interest.

Respectfully Submitted,

WILLIAM D. MASON
Cuyahoga County Prosecutor



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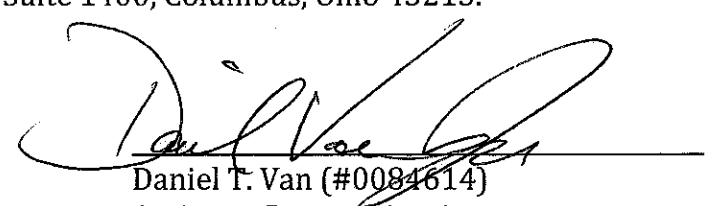
CERTIFICATE OF SERVICE

A copy of the foregoing memorandum in opposition to jurisdiction has been sent this 4th day of March, 2011 via U.S. Mail to: Amanda J. Powell (#0076418), Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



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